UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re	)	
	)	In Bankruptcy
CHRISTOPHER SMITH	)	
	)	No. 98-30494
Debtor.	)	
	)	
BANK OF CALHOUN COUNTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 98-3121
	)	
CHRISTOPHER SMITH,	)	
	)	
Defendant.	)	

OPINION

Before the Court is the "Objection to Discharge of Debt - Intentional Mishandling of Property" filed by Bank of Calhoun County ("Plaintiff") and the Answer thereto filed by Christopher Smith ("Debtor").

On September 7, 1995, Debtor executed a promissory note in favor of Plaintiff in the sum of $31,505.60. Debtor testified that, in 1994, he first borrowed approximately $19,000 in order to purchase a 1995 Jeep Wrangler ("the Jeep"), and that, in September 1995, he borrowed another $6,500 to modify the Jeep. Presumably, the September 7, 1995, promissory note is a consolidated note including future interest and fees.

Soon thereafter, Debtor hired Doc's Transmission to perform the enhancements, which included replacing the engine with a larger, Chevrolet V-8 engine, adding off-road tires, aluminum wheels, an enhanced rear end, and a lift kit. In addition, the manual transmission was switched to an automatic Chevrolet transmission and other mechanical and aesthetic modifications were made.

Very shortly thereafter, Debtor began to experience problems with the new engine and, over the next two to three years, he replaced the Chevrolet V-8 engine with at least two more Chevrolet V-8 engines which he had purchased from a junk yard. Debtor testified that from September 1995 through

February 1998, the Jeep was often not operable and was frequently partially disassembled. Debtor further testified that, on January 1, 1998, the Jeep was operable, but that in January or February 1998, the Chevrolet V-8 engine broke down.

At some point after September 1995, Debtor's payments on the promissory note with Plaintiff became delinquent. In 1997, Debtor filed two separate Chapter 13 petitions in bankruptcy. Both cases were dismissed. On January 6, 1998, Plaintiff filed a civil complaint in state court against Debtor seeking a judgment in the amount of $38,762 plus interest and costs. On February 4, 1998, Plaintiff's agents picked up the Jeep at Jeff's Auto Body in Jacksonville. At that time, most of the major mechanical components of the Jeep had been removed or were missing from the Jeep. The Chevrolet V-8 engine had been removed; a smaller six-cylinder engine was left along side the body of the Jeep. The transmission was left in the storage portion of the Jeep. The upgraded wheels and tires were replaced with standard equipment. At the time of the repossession, the Jeep was incomplete, inoperable and it was worth minimal salvage value. On February 17, 1998, the judgment was entered in the amount of $39,352.96 plus costs. The following day, Debtor filed his Chapter 7 petition in bankruptcy.

Plaintiff filed its "Objection to Discharge of Debt - Intentional Mishandling of Property" pursuant to § 727(a)(2) of the Bankruptcy Code on May 22, 1998. Plaintiff indicated that its Complaint was filed pursuant to 727(a)(2) rather than § 523(a)(6) primarily because the Complaint

would have been untimely filed under 523.

Federal Rule of Bankruptcy Procedure 4007 (c) states in part as follows:

> **(c) Time for Filing Complaint Under §523(c) in Chapter 7 Liquidation, Chapter 11 Reorganization, and Chapter 12 Family Farmer's Debt Adjustment Cases; Notice of Time Fixed.** A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a) . . .

Federal Rule of Bankruptcy Procedure 4004(a) states in part as follows:

> **(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed.** In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under §727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a) . . .

Debtor's first meeting of creditors was first scheduled and was in fact held in this case on March 27, 1998. Thus, the deadline to file complaints under both §§ 523 and 727 was May 26, 1998. Plaintiff's Complaint was filed on May 22, 1998. Accordingly, Plaintiff's Complaint would have been timely filed under either § 523 or § 727.

Section 727(a)(2) states in part as follows:

> (a) The court shall grant the debtor a discharge, unless -
>
> > (2) the debtor, with intent to hinder delay, or defraud a creditor . . . has transferred, removed, destroyed, mutilated, or concealed . . .
> >
> > > (A) property of the debtor, within one year before the date of the filing of the petition(.)

In order to prevail, the Plaintiff must prove that the Debtor acted with the actual intent to harm his creditors. In re Krehl, 86 F. 3d 737, 743 (7th Cir. 1996); In re Smiley, 864 F.2d 562, 566 (7th Cir. 1989). Constructive intent is insufficient. In re Chastant, 873 F. 2d 89, 91 (5th Cir. 1989); Tastee Donuts, Inc. v. Bruno, 169 B.R. 588 (E.D. La. 1994). The objecting party must demonstrate each of the elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287 (1991).

The Court finds Plaintiff's proof that Debtor acted with the actual intent to harm Plaintiff to be lacking. When the Jeep was repossessed, there was no evidence that it had been vandalized in any way, nor did Debtor ever make any statements which could be perceived as threats against Plaintiff or the

collateral. Section 727 imposes a very harsh sanction on a debtor, and this Court requires strict proof of egregious conduct in order to deny a discharge under § 727. Because of the insufficiency of evidence on Debtor's actual intent to harm Plaintiff, Debtor's discharge cannot be denied pursuant to 727(a)(2)(A).

This determination does not, however, conclude this matter. This Court has the authority to conform the complaint to the evidence pursuant to Federal Rule of Bankruptcy Procedure 7015 (b) As the Court suggested at the conclusion of the trial, the facts in this case indicate that an action pursuant to § 523 (a)(6) would have been more appropriate than an action under § 727(a)(2)(A). As the same body of facts make up both the Plaintiff's case and the Debtor's defense under both §§ 727 (a)(2)(A) and 523 (a)(6) , and as the Debtor' s defense would have been substantively identical if the Complaint were filed pursuant to § 523 (a)(6), Debtor is not prejudiced by allowing the pending Complaint to be construed as a § 523 (a)(6) action. Accordingly, the Court will allow the amendment.

Section 523 (a)(6) of the Bankruptcy Code states in part as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-
>
> > (6) for willful and malicious injury by the debtor to another entity or to the property of another entity(.)

"Willful" means intent to cause injury, not merely an intentional act that leads to injury. Kawaauhau v. Geiger, 118 S.Ct. 974, 977 (1998). "Malicious" means "in conscious disregard of one's duties or without just cause or excuse". Matter of Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). Debts arising from recklessly or negligently inflicted injuries do not fall within the willful and malicious injury exception. Kawaauhau v. Geiger, *supra*, 118 S. Ct. at 978. Whether an actor behaved willfully and maliciously is ultimately a question of fact reserved for the trier of fact. Thirtyacre, *supra*, 36 F.3d at 700.

The Court finds that Debtor removed valuable parts from the Jeep, knowing that Plaintiff was preparing to repossess it. Debtor admitted that the Jeep was running on January 1, 1998. Debtor further testified that when he removed the engine, transmission, and other parts from the Jeep, they were in junk condition and were discarded. Jeffrey Gaines, owner of Jeff's Auto Body in Jacksonville, testified that Debtor took possession of the parts, although he offered no evaluation of the condition of the parts. The

Court found Jeffrey Gaines credible and found Debtor's testimony to be evasive and not at all credible. The Court simply does not believe that in January 1998, at a time when Debtor had defaulted on his note to Plaintiff and Plaintiff had filed suit against Debtor seeking a judgment of in excess of $38,000, that Debtor would perform a major overhaul of the Jeep with the intention of removing junk parts so as to restore the Jeep to operable condition. For these reasons, the Court finds the debt nondischargeable under § 523 (a)(6).

The question of damages remains, and the evidence on this point is somewhat lacking. There was no evidence of what the value of the Jeep was immediately before the Jeep was cannibalized. Plaintiff argues that because Debtor scheduled the Jeep as having a value of $15,000 in his bankruptcy schedules that he should be bound by that valuation and that damages should be awarded in the amount of $15,000 minus salvage value, which Plaintiff's counsel argued was between $800 and $1,000 but which Plaintiff's expert, Donald Norris, testified was closer to $50 or $100. Debtor argues that Plaintiff's recovery should be limited to the fair market value of the collateral which, in this case, Plaintiff argued was approximately $800.

Debtor denied that the Jeep would have been worth $15,000 at the time he filed his Chapter 7 petition even if he had not taken it apart and, unfortunately for Plaintiff, there is no evidence to refute this contention. However, Debtor did admit that the Jeep could have been restored to operable condition for $4,000, which he would have done if he had had the funds. The Court finds that the best measure of damages in this case is this figure. For these reasons, Debtor's debt to Plaintiff is nondischargeable pursuant to523 (a)(6) in the amount of $4,000.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: October 29, 1998

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE